A

THE ROYAL SELANGOR GOLF CLUB

v.

PENTADBIR TANAH WILAYAH PERSEKUTUAN KUALA LUMPUR

B

COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
JEFFREY TAN JCA
ABDUL WAHAB PATAIL JCA
C [CIVIL APPEAL NO: W-01(IM)-339-2010]
17 JANUARY 2012

CIVIL PROCEDURE: *Appeal - Abuse of process - Notice of Appeal filed to Court of Appeal prior to filing of application to High Court to*
D *clarify and make consequential amendments to order - Whether duplicity of appeal process - No evidence of appeal being withdrawn -Whether filing of application must thus fail*

CIVIL PROCEDURE: *Jurisdiction - Inherent jurisdiction of court - Compensation payable in land reference matters - Whether Judicial*
E *Commissioner sitting alone has jurisdiction to decide - Whether matter should be dealt with by Land Reference Court - Land Acquisition Act 1960, ss. 40D(3), 49*

LAND LAW: *Acquisition - Compensation - Compensation payable in*
F *land reference matters - Jurisdiction - Whether Judicial Commissioner sitting alone has jurisdiction to decide - Whether matter should be dealt with by Land Reference Court - Land Acquisition Act 1960, ss. 40(D)(3), 49*

G On 29 April 2010, the learned Judicial Commissioner ('JC'), sitting alone, allowed an application (encl. 9) by the respondent, to clarify and if necessary make consequential amendment to a High Court decision delivered on 21 January 2010 ('the first order') in respect of compensation payable regarding a land reference matter. The JC
H made a new order ('second order') which altered the first order. Thus, the appellant appealed. The issue that arose was whether there was a duplicity of proceedings and an abuse of process.

I

Held (allowing the appeal with costs; setting aside the order of the Judicial Commissioner)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) In the ordinary case, if a court erred, the proper course is an appeal. Since a notice of appeal to the Court of Appeal had been filed earlier, the application in encl. 9 was in duplicity of the appeal process. Until an appeal is withdrawn, dismissed or otherwise disposed of by the court to which it is filed, it remains in existence as an appeal. No evidence was put before the court that the appeal was withdrawn. The filing of the application at encl. 9 before the High Court created a duplicity and thus must fail. There could not be a question of the party committing a duplicity being at liberty to choose which was to be proceeded with, without having first withdrawn the other. (para 12)

(2) Since the issue addressed was the amount of compensation, the JC sitting alone did not have the jurisdiction to decide. He could not therefore amend the first order in respect of a land reference heard with the aid of assessors. The Land Reference Court is a creature of statute under the Land Acquisition Act 1960. On matters affecting compensation, a judge sitting alone has no jurisdiction. Both were fundamental errors. Not only was the second order wrongly obtained, the JC had no jurisdiction to issue it. In light of ss. 40D(3) and 49 of the Land Acquisition Act 1960, the matter should have been dealt with by the Land Reference Court. Thus, the second order made by the JC must be set aside. (paras 18 & 19)

Bahasa Malaysia *Translation Of Headnotes*

Pada 29 April 2010, yang arif Pesuruhjaya Kehakiman ('PK'), bersidang sendirian, membenarkan permohonan (lampiran 9) oleh responden, untuk menjelaskan dan jika perlu membuat pindaan berikut ke atas keputusan Mahkamah Tinggi yang disampaikan pada 21 Januari 2010 ('perintah pertama') berkenaan dengan pampasan yang kena dibayar berhubungan perkara rujukan tanah. PK telah membuat perintah baru ('perintah kedua') yang telah mengubah perintah pertama. Oleh itu, perayu membuat rayuan. Isu yang timbul adalah sama ada terdapat kependuaan prosiding dan penyalahgunaan proses.

A **Diputuskan (membenarkan rayuan dengan kos; mengenepikan perintah Pesuruhjaya Kehakiman)**
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

B **(1)** Dalam kes biasa, jika mahkamah khilaf, tindakan yang sewajarnya diambil adalah dengan rayuan. Oleh kerana notis rayuan ke Mahkamah Rayuan telah difailkan sebelum ini, permohonan lampiran 9 adalah kependuaan proses rayuan. Sehingga rayuan ditarik balik, ditolak atau selainnya dilupuskan
C oleh mahkamah di mana ia difailkan, ia kekal wujud sebagai suatu rayuan. Tiada keterangan dikemukakan di mahkamah bahawa rayuan ditarik balik. Pemfailan permohonan lampiran 9 di hadapan Mahkamah Tinggi telah mewujudkan satu kependuaan dan oleh itu ia harus gagal. Tidak boleh menjadi
D persoalan di mana pihak yang melakukan kependuaan bebas untuk memilih yang mana satu boleh diteruskan tanpa terlebih dahulu menarik balik yang lain.

(2) Oleh kerana isu yang ditangani adalah jumlah pampasan, PK
E yang bersidang sendirian tidak mempunyai bidangkuasa untuk membuat keputusan. Beliau oleh itu tidak boleh meminda perintah pertama berkenaan rujukan tanah yang didengar dengan bantuan penaksir-penaksir. Mahkamah Rujukan Tanah adalah ciptaan statut di bawah Akta Pengambilan Tanah 1960.
F Mengenai hal-hal yang berkenaan dengan pampasan, hakim yang bersidang sendirian tidak mempunyai bidangkuasa. Kedua-duanya adalah kesalahan-kesalahan utama. Bukan sahaja perintah kedua diperolehi dengan salah, PK tidak mempunyai bidangkuasa untuk mengeluarkannya. Atas dasar ss. 40D(3)
G dan 49 Akta Pengambilan Tanah 1960, perkara itu sepatutnya diuruskan oleh Mahkamah Rujukan Tanah. Oleh itu, perintah kedua yang dibuat oleh PK harus diketepikan.

Legislation referred to:
Land Acquisition Act 1960, ss. 40A, 40D(3), 49
H Rules of the High Court 1980, O. 92 r. 4

For the appellant - Rosli Dahlan (Nadia Marni with him); M/s Hishammuddin Allen & Gledhill
For the respondent - Narkunavathy Sundareson SFC; AG's Chambers

I *[Appeal from High Court, Kuala Lumpur; Land Reference No: S7-15-7-2005]*

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Wahab Patail JCA:

[1] This was an appeal from the decision of the learned Judicial Commissioner on 29 April 2010 ("the 2nd Order") to allow an application by the Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur, the respondent herein, to clarify and if necessary make consequential amendment to a High Court decision delivered on 12 January 2010 ("the 1st Order") in respect of compensation payable.

[2] In dealing with land reference matters under the Land Acquisition Act 1960, the High Court is governed by the special provisions herein. Although in substance it is the High Court, we would refer to it as the Land Reference Court due to the special provisions applicable when the High Court sits with the assistance of assessors in a land reference matter.

The 1st Order

[3] The 1st Order on 12 January 2010 required the respondent to pay to the appellant:

a) additional compensation amounting to RM539,425.25; and

b) 50% of the late payment charges on the additional compensation at 8% p.a. from 15 November 1989 to date of full settlement.

[4] The respondent filed an appeal against the 1st Order on 2 March 2010.

The 2nd Order

[5] On 29 April 2010, the learned Judicial Commissioner, sitting alone, upon an application (encl. 9) by the respondent filed in March 2010 and fixed for hearing 15 March 2010, allowed the application and made a new order which altered the 1st Order as follows:

a) The respondent to pay the 1st applicant an additional compensation of RM340,468.22 only; and

b) The respondent to pay 50% of late payment charge at 8% per annum on RM340,468.22 from the date of Borang K (15 November 1989) to date of full settlement.

[6] The appellant appealed against this 2nd Order.

Grounds Of Appeal

[7] The grounds of appeal pursued before us were:

a) Duplicity of proceedings and abuse of process;

b) The appellant as holder of reversionary rights is entitled to receive the full compensation of RM539,425.50; and

c) The appellant is entitled to compensation for injurious affection.

The Enclosure 9 Application

[8] The respondent's application in encl. 9 was filed on March 2010 and fixed to be heard on 15 March 2010. By it the respondent sought the following orders:

a) Bahawa pihak-pihak dibenarkan hadir bagi menjelaskan (clarify) award mahkamah yang diberi pada 12.1.2010 berhubung dengan pampasan tambahan kepada Pemohon Pertama bagi tanah pajakan sublot III dan sublot VI;

b) Bahawa sekiranya perlu, meminda/mengetepikan perintah tersebut; dan

c) Bahawa kos permohonan ini ditanggung oleh pihak masing-masing.

[9] The reasons given therein were:

a) Bahawa pembahagian pampasan tambahan bagi tanah pajakan kelihatan tidak konsisten dengan pembahagian pampasan yang telah ditentukan oleh Pentadbir Tanah, iaitu 27/80 dan 34/80 masing-masing;

b) Bahawa sekiranya pembahagian pampasan tambahan bagi tanah pajakan seperti yang diputuskan oleh Mahkamah dikekalkan, ia akan mengakibatkan suatu keadaan yang janggal di mana bahagian pemegang pajakan adalah kurang daripada awad yang diberi kepada Pentadbir Tanah; dan

c) Dalam semua hal keadaan kes perkiraan pampasan tambahan perlu disemak semula dan diperjelaskan dan sekiranya perlu, diketepikan/dipinda demi kepentingan keadilan.

[10] The application in encl. 9 made under O. 92 r. 4 of the Rules of the High Court 1980 was supported with an affidavit from one Alice Loke Yee Ching affirmed on 4 March 2010 who deposed:

> 7. Pada 1.3.2010, pihak Jabatan Penilaian dan Pengurusan Harta, Dewan Bandaraya Kuala Lumpur telah menulis surat kepada pejabat saya untuk memohon penjelasan berkaitan dengan keputusan mahkamah bertarikh 12.1.2010, khususnya berhubung dengan pampasan tambahan bagi tanah pajakan. Surat tersebut kini dikemukakan dan dieksibitkan sebagai "ALYC-1".
>
> 8. Saya sesungguhnya menyatakan bahawa setelah meneliti isu yang dibangkitkan dalam surat tersebut, perkiraan berhubung tanah pajakan perlu disemak semula kerana:
>
> (a) sekiranya pampasan tambahan kepada Pemohon Pertama bagi tanah pajakan adalah RM54 sekaki persegi, pemegang pajakan hanya menerima RM36 sekaki persegi sahaja. Perkiraan ini kelihatan bertentangan dengan awad Pentadbir Tanah yang telah memutuskan bahagian pemegang pajakan adalah RM53 sekaki persegi bagi sublot III. Ini telah mewujudkan suatu keadaan yang janggal;
>
> (b) bagi tanah pajakan sublot III dan sublot VI, Pentadbir Tanah telah mengawadkan RM27 dan RM34 kepada Pemohon Pertama masing-masing. Akan tetapi dengan kenaikan nilai tanah ke RM54 sekaki persegi kepada Pemohon Pertama bagi kedua-dua tanah pajakan, perkiraan mahkamah seolah-olah tidak mengambilkira kadar yang berbeza dalam awad Pentadbir Tanah.
>
> (c) pembahagian awad oleh Pentadbir Tanah bagi tuan tanah dan pemegang pajakan tidak dipertikaikan dalam kes ini berpandukan Notis Bantahan yang difailkan oleh Pemohon Pertama. Oleh yang demikian, pembahagian bagi pampasan tambahan seharusnya konsisten dengan pembahagian yang ditentukan oleh Pentadbir Tanah, iaitu 27/80 dan 34/80 bagi sublot III dan VI masing-masing.
>
> 9. Saya sesungguhnya menyatakan bahawa berdasarkan kepada alasan yang dinyatakan di atas, adalah perlu untuk pihak-pihak hadir bagi menjelaskan (clarify) perkiraan pampasan tambahan kepada Pemohon Pertama berhubung tanah pajakan, dan sekiranya perlu, mengetepikan/meminda perkiraan tersebut.

A 10. Saya sesungguhnya menyatakan Mahkamah yang Mulia Ini mempunyai bidangkuasa sedia ada (inherent) untuk mengetepikan/meminda perkiraan awad sekiranya didapati ia perlu dikira semula untuk mengelak daripada berlaku suatu ketidakadilan kepada pihak-pihak dalam kes ini.

B **[11]** Order 92 r. 4 of the Rules of the High Court 1980 pertains to the preservation of the inherent powers of the court and the said rule declares that for the removal of doubts nothing in the rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice C or to prevent an abuse of the process of the court.

[12] In the ordinary case, if a court erred, the proper course is an appeal. Since a notice of appeal to the Court of Appeal had been filed earlier, the application in encl. 9 is in duplicity of the D appeal process. Until an appeal is withdrawn, dismissed or otherwise disposed of by the court to which it is filed, it remains in existence as an appeal. No evidence was put before the court that the appeal was withdrawn. The alternative of making an application to clarify the order appealed from having been forgone, E remained foregone. The filing of the application at encl. 9 before the High Court created a duplicity. The document that created the duplicity must fail. There cannot be a question of the party committing a duplicity being at liberty to choose which is to be proceeded with, without having first withdrawn the other.

F **[13]** The inherent powers reserved under O. 92 r. 4 pertain to those instances where no provision is provided in the rules, and there arises a need to consider what inherent power the court may have, to prevent an injustice. In that context, O. 92 r. 4 G offers the clarification that nothing in the rules is to be interpreted to limit the power of the court to prevent injustice or to prevent an abuse of the process of the court. Since the relevant legislation has provided a specific provision in respect of appeals from the Land Reference Court, the question of resort to any inherent H power to prevent injustice under the Rules of the High Court 1980 does not arise.

[14] The alternative ground to prevent an abuse of the process of the court also does not arise. On this subject we observe that nowhere in the affidavit affirmed on 4 March 2010 in support of I encl. 9 was it disclosed that a notice of appeal had been filed by the respondent two days earlier on 2 March 2010. The deponent

of the said affidavit was none other than the same counsel who appeared before the learned Judicial Commissioner in the 1st Order. Instead, the course adopted by the respondent was an application couched or disguised in terms of seeking clarification and if necessary to amend the order, but instead seeking to amend the 1st Order so as to clarify its terms. What was sought and obtained was well beyond the scope of clarification to a substantive amendment of the 1st Order to the terms in the 2nd Order.

[15] We further observe that the learned Judicial Commissioner did not sit with the assistance of any assessor in making the 2nd Order when he amended the 1st Order which was made with the assistance of assessors. The notes of evidence recorded in respect of the 1st Order, a unanimous decision with which the learned Judicial Commissioner concurred.

[16] Section 40A of the Land Acquisition Act 1960 provides that with regard to the amount of compensation, the judge shall be assisted by assessors to assist him.

[17] Section 40D provides:

> (1) In a case before the Court as to the amount of compensation or as to the amount of any of its items the amount of compensation to be awarded shall be the amount decided upon by the two assessors.

[18] Since the issue addresses the amount of compensation, the learned Judicial Commissioner sitting alone does not have jurisdiction to decide. He cannot therefore amend the 1st Order in respect of a land reference heard with the aid of assessors. The Land Reference Court is a creature of statute under the Land Acquisition Act 1960. On matters affecting compensation, a judge sitting alone has no jurisdiction. That no objection was raised, or that it was a "recomputation" cannot vest the learned Judicial Commissioner with jurisdiction.

[19] Both are fundamental errors. Not only was the 2nd Order wrongly obtained, the learned Judicial Commissioner had no jurisdiction to issue it. In light of ss. 40D(3) and 49, the matter is to be dealt with by the Land Reference Court.

A **[20]** In the event, appeal must be allowed and the 2nd Order made by the learned Judicial Commissioner must be set aside.

[21] We, therefore, allowed the appeal with costs and set aside the order of the learned Judicial Commissioner.

B

C

D

E

F

G

H

I